

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

ATTY.'S DOCKET: LOESSNER1

In re Application of:) Office of the Deputy
LOESSNER et al.) Commissioner for Patent
) Examination Policy
)
Patent No.: 7,438,901) Washington, D.C.
)
Patent Date: October 21, 2008) Confirmation No. 5123
)
For: VIRULENT PHAGES TO ...) December 24, 2008

REQUEST FOR RECONSIDERATION OF PATENT TERM ADJUSTMENT

Honorable Commissioner for Patents
U.S. Patent and Trademark Office
Customer Service Window
Randolph Building, Mail Stop **Petitions**
401 Dulany Street
Alexandria, VA 22314

Sir:

Pursuant to 37 CFR 1.705(d), reconsideration of the patent term adjustment indicated on the face of the above-identified patent is hereby requested.

In accordance with 37 CFR 1.705(b)(1), submitted herewith is the fee of \$200 as set forth in 37 CFR 1.18(e). If there is any underpayment or any other fee necessary for consideration of this request, please charge same to the deposit account no. 02-4035 of the undersigned.

The following statement of the facts involved is in compliance with 37 CFR 1.705(b)(2). The correct patent term adjustment is 583 days. The period of delay under 37 CFR 1.702(a) is 468 days, as properly calculated by the PTO (the

period of time under 1.702(a)(1) from February 1, 2006 - which is 14 months after the 371(c) date - to January 17, 2007 - on which the first office action under 35 USC 132 was mailed (350 days), plus the additional delay under 1.702(a)(2) from February 16, 2007 - date a response was filed - to October 12, 2007 - date of next official notification under Section 132 (118 days)).

However, the PTO failed to take into account the non-overlapping period of delay under 37 CFR 1.702(b). The period of time from December 1, 2007 (three years after the 371(c) date) to issuance of the patent on October 21, 2008, was 325 days. There was no period of actual calendar days overlap between the time periods of delay calculated under 1.702(a) and 1.702(b) in accordance with the proper interpretation of 37 CFR 1.703(f), as held by the U.S. District Court in *Wyeth v. Dudas*, 2008 U.S. Dist. LEXIS 76063, 88 USPQ2d 1538 (D.D.C. Sept. 30, 2008)..

Thus, the period of patent term adjustment by the interpretation approved by the court in *Wyeth v. Dudas, supra*, is $468+325=793$ days, minus any period attributed to applicant's delay (37 CFR 1.704). The PTO calculated this as 210 days. Thus, using the PTO's figures and the court's interpretation, the correct period for patent term adjustment should have been 583 days, i.e., $793 - 210 = 583.00$ days. No terminal disclaimer has been filed in this case.

These issues could not have been raised on or before the date of payment of the issue fee as the period of

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adjustment under 1.702(b) did not become determined until the patent issued. Indeed, the PTO does not consider the effect of the 1.702(b) period until it mails the issue notification. Accordingly, this request for reconsideration of the patent term adjustment is timely under 37 CFR 1.705(d).

Granting of this request and modifying the patent term adjustment afforded this case to a total of 583 days are therefore earnestly solicited.

Respectfully submitted,

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